SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-316

CHARLES D. KERN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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CHARLES D. KERN, *Petitioner,*

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COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia rendered on the 27th day of June, 1974.

CITATIONS TO OPINIONS BELOW

The Supreme Court of Virginia rendered no opinion in the case. The Supreme Court of Virginia entered an order on the 27th day of June, 1974, rejecting petitioner's application for a writ of error. This order is attached to this Petition.

JURISDICTION

The judgment of the Supreme Court of Virginia, entered on the 27th day of June, 1974, is attached to this petition. The Supreme Court of Virginia is the

highest state court in the State of Virginia. Jurisdiction of this Court is invoked under Title 28 § 1257 of the United States Code.

QUESTION PRESENTED

Was not the petitioner denied due process of law under the Fifth and Sixth Amendments of the Constitution by the action of the Supreme Court of Virginia in affirming the judgment of the trial court which refused to allow petitioner to withdraw his plea of guilty prior to the imposition of sentence when the counsel who represented him at the time he entered the plea advised the court that he had misadvised the petitioner on his right to have witnesses on the motion to suppress and when his counsel candidly advised the court that he himself was a factual witness who should have testified at the motion to suppress?

STATEMENT OF THE CASE

The petitioner was indicted for unlawfully possessing marijuana with intent to distribute in violation of the Virginia Code, Title 54 § 524.1011(a). Petitioner filed a motion to suppress the narcotics which were seized and which formed the basis for the prosecution. This motion was denied by the trial judge on September 7, 1973. Four days later on September 11, 1973, the petitioner with counsel entered a plea of guilty. On November 9, 1973, twenty-nine days after the plea of guilty had been entered, the petitioner, through another counsel, moved to withdraw his guilty plea. The motion set forth no reasons and stated they would be given during the course of the oral hearing. The motion to withdraw came on for oral hearing on November 23, 1973. At this hearing the attorney who

had represented the petitioner at the time he entered his plea of guilty stated *inter alia* * * * "I would like to suggest there was a pretrial motion filed here to suppress certain evidence of which I had knowledge of and I gained that knowledge through the telephone by talking to the people at home, talking to the detectives while he was at the home on two occasions which I am embarrassed to suggest to the court that I should have been in a position to testify to those conversations at the pre-trial motion to suppress. I did not." (Transcript 7, proceedings of November 23, 1973.)

Petitioner's counsel further advised the court that "certain evidence was not produced at the pre-trial motion that ought to have been, namely my knowledge of what had transpired between the police department and Mrs. Kern, the defendant's wife. In that connection, I apologize for my error or omission there to the court for causing or may cause additional time and costs and energy to all parties concerned." (Tr. 8, proceedings of November 23, 1973.)

The counsel who had represented him at the time the plea of guilty was entered also candidly admitted on the record that he did not advise petitioner of the conflict which arose because of his dual position as a lawyer for petitioner and his position as a witness to factual matter which was material to the motion to suppress. The counsel who represented him at the time the plea of guilty was entered stated on the record, "I should have advised him and some other member of my firm or some other attorney should have argued the pretrial motion. In fact, to be very candid with the court, he wasn't aware of it until he in fact sought advice of other counsel, namely Mr. Fortkort" (Tr. 7 and 8). The attorney further stated on the record that

he did not advise petitioner adequately of his rights to produce witnesses at the motion to suppress (Tr. 9, proceedings of November 23, 1973). The trial judge denied the motion to withdraw the plea and the matter was continued for sentencing. The petitioner was sentenced on January 11, 1974 to eight years in the penitentiary, three years of which were suspended. The petitioner applied to the Supreme Court of Virginia for a writ of error which was denied on June 27, 1974. This judgment is the final judgment of the highest court in the State of Virginia.

STATUTES AND RULES INVOLVED

Fifth Amendment to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

REASONS WHY THE WRIT SHOULD BE GRANTED

The refusal of the trial court to allow petitioner to withdraw his plea of guilty prior to sentence when the counsel who represented him at the time the plea was entered stated on the record that the petitioner was misadvised as to his rights to produce witnesses at the hearing, and was not advised that his counsel was a necessary fact witness in the hearing, deprived the petitioner of due process of law under this Court's ruling in McMann v. Richardson, 397 U.S. 768, 90 S.Ct. 1401, and Brady v. United States, 397 U.S. at 756, 90 S. Ct. 1473.

The statement of the case outlines the representations made by the petitioner's counsel at the time the plea of guilty was entered. We recognize that it is not sufficient for a criminal defendant to set aside a guilty plea entered on advice of counsel, to show that his counsel in retrospect may not have correctly evaluated the constitutional significance of certain historical facts, nor is it sufficient that it show that if counsel had pursued a certain factual inquiry such pursuit would have unearthed a possible constitutional infirmity in the proceedings. *Tollettson* v. *Henderson,* 411 U.S. 258, 93 S.Ct. 1602.

This case discloses a record where in addition to the petitioner's counsel candidly admitting on the record his failure to advise petitioner on substantial issues affecting his rights to effective assistance of counsel under the Sixth Amendment, we have the dual problem of an unrefuted record whereby the petitioner's counsel set forth that at the time the plea of guilty was entered and at the time the motion to suppress was heard, he was in possession of facts which made him a necessary fact witness at the motion to suppress and the petitioner was not so advised. This Court in *McMann* v. *Richardson, supra,* recognized that mere erroneous advice of an attorney in and of itself does

not afford grounds for setting aside a plea of guilty duly entered. This Court stated:

> Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether the advice was within the range of competence demanded of attorneys in criminal cases.

While this case does not involve a confession, the frank and candid statements of the petitioner's counsel who represented him at the motion to suppress and who represented him at the time the guilty plea was entered clearly establish that petitioner was denied effective assistance of counsel and due process of law, both at the motion to suppress and at the time the guilty plea was entered.

We think the present issue presented to this Court is not simply whether the trial judge abused his discretion, but whether petitioner was denied the basic elements of adequate representation on the only issue that was central and important to his case, namely, the motion to suppress. The record is also unrebutted with respect to the defendant's mental state, for when addressing himself to the court, the following appears:

> On the morning I pleaded guilty, I was not * * * it was my attorney's * * * my decision that morning. I was really in a state of * * * just disorder and my mind, by everything else, I mean, I just don't know what I wanted. I wasn't home when this action took place.

The state court decisional law on withdrawing a plea prior to the imposition of sentence is also very similar to the liberal rule followed in the federal courts. In

the leading case of *Parris* v. *Commonwealth,* 189 Va. 321, 52 S.E. 2d 872, the court stated:

> To the same effect is Reed v. Commonwealth, 98 Va. 817, 36 S.E. 399.
>
> The principle briefly announced in the above two decisions from this jurisdiction is more elaborately set out in 14 Am.Jur., "Criminal Law", sec. 287, at p. 961:
>
> > "As in other cases of discretionary power, no general rule can be laid down as to when a defendant will be permitted to withdraw his plea. The decision in each case must depend to a great extent on the particular attendant circumstances. Generally, however, it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury."
>
> Under what circumstances the trial court should allow a plea of guilty to be withdrawn and one of not guilty substituted is well stated in Abbott, Criminal Trial Practice, 4th ed., sec. 118, at p. 212, where, among other things, it is said:
>
> > "The plea of guilty to a serious criminal charge should be freely and voluntarily made,

> and entered by the accused, without a semblance of coercion, and without fear or duress of any kind, and the accused should be permitted to withdraw a plea of guilty entered unadvisedly when application therefor is duly made in good faith and sustained by proofs, and a proper offer is made to go to trial on a plea of not guilty."

The unrefuted record therefore establishes that at the motion to suppress and when the plea of guilty was entered, the petitioner's assistance of counsel was no more than perfunctory and this has been consistently held by this Court to be insufficient to satisfy the due process requirements of the Fifth Amendment and the requirements of effective assistance of counsel embraced in the Sixth Amendment. See, *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55; *Avery* v. *Alabama,* 308 U.S. 444, 60 S.Ct. 321; *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457.

The record above clearly establishes that the petitioner was denied due process of law and this Court should grant the writ of certiorari.

CONCLUSION

The only issue in dispute in this case was the validity of the search and hence the record in this case which is unrefuted and establishes clear violation of the petitioner's rights to effective assistance of counsel under the Sixth Amendment at the motion to suppress should prompt this court to grant the writ of certiorari.

Respectfully submitted,

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041
Counsel for Petitioner

APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 27th day of June, 1974.

The petition of Charles David Kern for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 11th day of January, 1974, in a prosecution by the Commonwealth against the said petitioner for a felony (Count I), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

HOWARD G. TURNER, Clerk

By: /s/ ALLEN L. LUCY
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 25th day of July, 1974.

Record No. 740441

CHARLES DAVID KERN, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Order Staying Execution of Judgment

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on June 27, 1974, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on June 27, 1974, be, and the same is hereby, stayed, until the 25th day of September, 1974, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

/s/ H. FURUER
Clerk